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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CAMRON SEWELL, Defendant and Appellant.	2d Crim. No. B291788 (Super. Ct. No. 18CR01378) (Santa Barbara County)

Camron Sewell appeals his conviction by plea for resisting an executive officer (Pen. Code, § 69)[1] after the trial court suspended imposition of sentence and granted three years probation. Appellant was ordered, as a term of probation, not to "drink or possess any alcoholic beverages and stay out of places where they are the chief item of sale. Stay out of bars and liquor stores." Appellant contends that the probation condition is not reasonably related to future criminal activity and is unconstitutionally vague. We affirm the judgment of conviction

[1] All statutory references are to the Penal Code.

but remand with directions to conduct a hearing on appellant's ability to pay a $1,375 probation investigation fee. (§ 1203.1b, subd. (b).)

Facts

Appellant, a Santa Barbara County Jail inmate, became upset when he was told that his commissary items would not be delivered that day. Appellant was under the influence of methamphetamine and became angry, throwing things around his jail cell, and head butting the glass partition on the cell door. Sheriff's Deputy Jose Velazquez told appellant he was being moved to a different cell. Appellant clenched his fist, assumed a fighting stance, and threw Deputy Velasquez to the floor, causing the deputy to suffer scrapes and abrasions.

Appellant was charged with battery with injury on a police officer (§ 243, subd. (c)(2)), resisting an executive officer (§ 69), and assault on a custodial officer by means likely to produce great bodily injury (§ 245.3). Pursuant to a written plea agreement, appellant pled no contest to resisting an executive officer with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754), and was granted probation. The plea agreement provided for anger management classes, drug terms, and "any other [terms and conditions] that probation deems suitable."

At the sentencing hearing, appellant objected to paragraph 24 of the probation order which provided that appellant not drink or possess alcoholic beverages and stay out of places where alcohol is the chief item of sale. Appellant's trial attorney argued that the offense involved methamphetamine, not alcohol. "I don't think that it's the Court's prerogative or probation's prerogative . . . to say [appellant] can't have a beer when his issue is with methamphetamine." The trial court

responded: "I understand that there's no direct nexus between the offense . . . , but do we really want to tell [appellant] it's ok to drink alcohol[?]" The trial court found that the appellant "got problems with drug abuse, more generally substance abuse. It appears he started drinking alcohol at the age of 13. He's indicated he hasn't drunk alcohol recently. But it doesn't seem to me to further his rehabilitation to say to him go into a bar and drink beer and alcohol. [¶] I think it's reasonably related to future criminality. The whole goal here is to try to help [appellant], try to make sure that he's not abusing substances whether they're legal or illegal."

Future Criminality

In granting probation, the trial court has broad discretion in determining what terms and conditions will promote a defendant's rehabilitation and protect public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*).) A reviewing court should defer to the trial court's choice of probation conditions absent a manifest abuse of discretion. (*People v. Moran* (2016) 1 Cal.5th 398, 402 (*Moran*).)

Citing *People v. Lent* (1975) 15 Cal.3d 481, 486, appellant argues that a probation condition is unreasonable if it: (1) is not reasonably related to defendant's crime, (2) relates to conduct that is otherwise legal, and (3) requires or forbids conduct that is not reasonably related to preventing future criminality. Appellant claims there must be a nexus between the probation term and current offense, but that is not the law. A probation condition is valid if it is reasonably related to future criminality even if the condition has no relationship to the current offense and prohibits conduct that is legal. (*Moran*, *supra*, 1 Cal.5th at p. 403; *People v. Olguin* (2008) 45 Cal.4th 375,

380.) Our courts recognize a strong nexus between drug use and alcohol consumption and have upheld alcohol conditions where the probationer has a history of consuming illegal drugs. (See *People v. Malago* (2017) 8 Cal.App.5th 1301, 1308 (*Malago*); *People v. Beal* (1997) 60 Cal.App.4th 84, 87 (*Beal*).)

The instant case is no exception. Appellant was "coming down" from methamphetamine when he assaulted the deputy and had a long history of substance abuse problems. He started drinking at age 13, used marijuana and cocaine by age 14, was taking ecstasy and opiates in his late teens, and by age 20 was addicted to heroin, fentanyl, and methamphetamine. Appellant consumed methamphetamine on a daily basis for six years and admitted consuming heroin, alcohol, and methamphetamine within the two month period preceding his arrest. Appellant told the trial court that he needed substance abuse treatment and could get help from "daily NA, AA meetings."

People v. Kiddoo

Appellant's reliance on *People v. Kiddoo* (1990) 225 Cal.App.3d 922 (*Kiddoo*), disapproved on other grounds in *People v. Welch,* 5 Cal.4th 228, 237, is misplaced. There, defendant started using drugs and alcohol at age 14, and was a social drinker who used methamphetamine "sporadically." (*Id*. at p. 927.) He sold drugs to support a gambling habit. (*Ibid*.) Defendant pled guilty to possession of methamphetamine and was granted probation. (*Ibid*.) He was ordered, as a condition of probation, not to possess or consume alcoholic beverages or frequent places where alcoholic beverages are the chief item of sale. (*Id*. at p. 924.). The Court of Appeal reversed, concluding

that alcohol terms were not reasonably related to future criminal behavior. (*Id*. at pp. 927-928.)

Kiddoo has been "disapproved" by a number of courts. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 68 (*Balestra*) [disagreeing with fundamental assumption in *Kiddoo* that alcohol and drug abuse are not reasonably related]; *Malago*, *supra*, 8 Cal.App.5th at p. 1308 [same]; *Beal*, *supra*, 60 Cal.App.4th at p. 87 [same].) "[E]mpirical evidence shows that there is a nexus between drug use and alcohol consumption. It is well documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs. [Citation.]" (*Beal*, *supra*, at p. 87.) *Kiddoo* is inconsistent with the rule that appellate courts should defer to the trial court's broad discretion in imposing probation terms, particularly where the terms are intended to aid the probation officer in ensuring that appellant obeys all laws and does not suffer a drug relapse. (*Balesta*, *supra*, at p. 69.)

Unlike *Kiddoo,* appellant was coming down from methamphetamine when he committed the offense and was not just a social drinker or "sporadic" drug user. (*Kiddoo*, *supra*, 225 Cal.App.3d at p. 927.) Appellant consumed methamphetamine on a daily basis for six years and consumed heroin, alcohol, and methamphetamine within the two-month period preceding his arrest. "Given the nexus between drug use and alcohol consumption, we find no abuse of discretion in the imposition of the condition of probation relating to alcohol usage." (*People v. Smith* (1983) 145 Cal.App.3d 1032, 1035.) The alcohol terms reasonably relate to appellant's future criminality and were imposed to improve appellant's chances for rehabilitation and to protect public safety. (*Carbajal*, *supra*, 10 Cal.4th at p. 1120.)

Appellant makes no showing that the alcohol terms are arbitrary, capricious, or exceeds the bounds of reason. (*People v. Welch* (1993) 5 Cal.4th 228, 233-234.)

Vagueness

Appellant complains that the alcohol conditions are vague and fail to say whether constructive possession is prohibited. A probation condition will not be struck on vagueness grounds simply because there may be difficulty in determining whether some hypothetical act is covered by the probation term. (See *People v. Morgan* (2007) 42 Cal.4th 593, 606 [discussing statutory vagueness].) The probation order states: "Do not drink or possess any alcohol beverages" and "[s]tay out of bars and liquor stores." It is sufficiently precise for appellant to know what is required of him and for the court to determine whether the probation condition has been violated. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) There is no due process requirement that the probation order explicitly state that appellant is prohibited from having constructive possession of alcoholic beverages. Because constructive possession requires a knowing exercise of dominion and control of the alcoholic beverage (see, e.g., *People v. Mejia* (1999) 72 Cal.App.4th 1269, 1272 [firearms]; *People v. Kim* (2011) 193 Cal.App.4th 836, 846 [knowledge is an implicit element in the concept of possession]), and revocation of probation requires proof that the probation violation was willful, the alcohol terms afford appellant fair notice of what conduct is required of him. (*People v. Hall* (2017) 2 Cal.5th 494, 497-498 (*Hall*) [knowledge requirement resolves constitutional concerns arising from breadth of condition banning possession of drug paraphernalia].) "The unwitting possession of [alcohol] does not sufficiently establish backsliding by the probationer, nor does

sufficiently threaten public safety, to merit revocation without regard to the probationer's state of mind." (*Id*. at p. 499.) It is settled that a probation condition should not be invalidated as unconstitutionally vague """if any reasonable and practical construction can be given to its language."""" (*Id*. at p. 500.)

Appellant argues that the probation order to stay out of places where alcohol is the "chief item of sale" could include a grocery store or football stadium and that due process requires that he be provided a list of prohibited stores and recreational venues. If that were the law, a probation order to "obey all laws" would likewise be unenforceable. A probation condition will not be invalidated as unconstitutionally vague if a reasonable and practical construction can be given to its language. (*Hall*, *supra*, 2 Cal.5th at p. 501.) In order to establish a probation violation the prosecution must show that appellant knew alcoholic beverages were the chief item of sale. (*Id*. at p. 502.) "Just as most criminal statutes – in all their variety – are generally presumed to include some form of mens rea despite their failure to articulate it expressly, so too are probation conditions generally presumed to require some form of willfulness, unless excluded ""expressly or by necessary implication."" [Citation.]" (*Ibid*.)

Ability to Pay Probation Investigation Fee

Appellant contends, and the Attorney General agrees, that the trial court failed to conduct a hearing on appellant's ability to pay a $1,375 probation investigation fee. (§ 1203.1b, subd. (b).)[2] Appellant requested that the fee be stricken based on

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[2] Section 1203.1b, subdivision (b) provides in pertinent part: "When the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her

his inability to pay. Overruling the objection, the trial court found that the fee was not a condition of probation. "[I]t's kind of a standard investigative fee. I'm going to leave it." Appellant did not waive his right to have the trial court determine his ability to pay pursuant to section 1203.1b, subdivision (b). (*People v. Trujillo* (2015) 60 Cal.4th 850, 855; *People v. McCullough* (2013) 56 Cal.4th 589, 592-593.)

Disposition

The order requiring appellant to pay a $1,375 probation investigation fee is set aside. The case is remanded to the trial court to determine appellant's ability to pay all or a portion of probation investigation fee in accordance with the provisions of section 1203.1b, subdivision (b). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

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ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs." Here, the probation report stated that appellant had not waived his right to a hearing and that an ability to pay hearing had to be calendared.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

Joshua Schraer, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Acting Supervising Deputy Attorney General, Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.